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REVISE PARENTAL CONSENT WAIVER FOR ABORTION

House Bill 4478 as introduced
First Analysis (6-18-03)

Sponsor: Rep. William J. O'Neil
Committee: Family and Children Services

THE APPARENT PROBLEM:

In 1990 the legislature enacted (via the initiative process and not through the normal legislative process) the Parental Rights Restoration Act (Public Act 211 of 1990), which provides for parental consent in those instances when a minor is seeking an abortion. In accordance with the U.S. Supreme Court's jurisprudence regarding parental consent, the act also provides for a judicial bypass of parental consent, if it is determined that waiving the parental consent requirement is in the best interest of the minor or that the minor is sufficiently mature and well-enough informed to make the decision regarding abortion independently of her parents or legal guardian.

According to the Michigan Supreme Court's 2001 annual report, there were 600 filings in the Family Division of the Circuit Court for a waiver of parental consent in 2001. Although the final disposition of these cases is not readily available, it is estimated, according to committee testimony, that approximately 90 percent of the parental consent waivers are granted.

In addition, records compiled by the Department of Community Health estimate that in 2001, there were an estimated 7,034 pregnancies among females between 15 and 17 years of age. Of those pregnancies, the department estimates that there were 4,263 live births; 1,744 abortions; and 1,027 miscarriages. From that data, approximately one-quarter of all pregnancies in females between 15 and 17 years of age will result in an abortion.

Supporters of the parental consent law say it has been successful but needs improving. Since 1990, the number of pregnancies, live births, miscarriages, and abortions among females between 15 and 17 years of age have all declined. Supporters say that since the law has been in effect, the number of abortions among 15-17 year olds has decreased by over 55 percent – from 3,239 in 1990 to 1,774 in 2001. (Pregnancies in that age group are reported to have declined from 11,945 to 7,304 over the same period.) In addition, the number of requests for parental consent waivers has dropped each year since 1998 (although it should be noted that figures for previous years are not immediately known).

On the other hand, with an estimated 90 percent approval rate for waivers of parental consent, some of the law's supporters complain that judges in the family division simply "rubber stamp" these waiver requests without much evaluation. They believe that the apparent ease in obtaining a waiver is due, in part, to a lack of standards in the law for the judge to apply in determining whether a waiver should be granted; the lack of representation for parents in the process; and "judge shopping" by minors until they find a court that will grant the waiver.

THE CONTENT OF THE BILL:

The Parental Rights Restoration Act requires a minor to obtain consent from at least one parent or legal guardian prior to obtaining an abortion. The act does, however, permit the minor to petition the probate court (now the Family Division of the Circuit Court) to obtain a waiver of the parental consent requirement. House Bill 4478 would amend the act to say that a minor cannot file a petition for waiver of parental consent in the family division if she has previously been denied a waiver by another family division concerning the same pregnancy. The bill would also add that the minor would be notified of this prohibition and that a previously denied waiver would be dismissed by the court.

The act currently allows the court to grant a waiver of parental consent if it finds that the minor is sufficiently mature and well-enough informed to make a decision regarding abortion independently of her parents or legal guardian or if the waiver is in the best interest of the minor. The bill would add that in

making its determination regarding the waiver petition, the court would have to consider the rebuttable presumption that a minor is not capable of providing informed consent for medical treatment. The bill would provide that a waiver could only be granted if the minor demonstrates to the court a level of maturity expected of an individual who has reached the age of majority based on the factors that follow.

- The minor's age, ability to comprehend information, and the ability to express herself.

- The degree of the minor's dependence on her parents or legal guardian and the degree of parental supervision in the daily affairs of the minor, including housing arrangements, financial support, independent work experience, and means of transportation.

- The minor's school attendance, academic performance, and future education and career goals.

- The circumstances of the minor's sexual activity, including actions taken to maintain her health and prevent pregnancy, and any previous pregnancies.

- The minor's knowledge of her medical history, of the risks associated with an abortion and of carrying the pregnancy to term, including the emotional and psychological consequences of an abortion, parenting, and placing a child for adoption.

- The extent to which the minor has consulted with medical and mental health professionals about alternatives to abortion.

- Other life experiences that demonstrate a pattern of responsible, mature behavior.

If the court did not find that the minor is sufficiently mature or informed to make such a decision, the court could still grant a waiver if it finds that it would be in the minor's best interest. In making a determination, the court would have to consider the rebuttable presumption that a minor's best interest is served by involvement of her parents in any medical decision making. A waiver could only be granted if the court finds that both parents or a legal guardian have so materially defaulted in their duties to the minor that they have abdicated their right to parental involvement. Such a determination would be based on the evidence presented on the following factors: the nature of the minor's relationship with her parents or legal guardian, including patterns of care, support, and involvement, or of neglect, hostility, or abuse; the minor's reasons for seeking an abortion, including her personal desires, the age and involvement of the biological father, and the potential influence of other parties; the specific reasons for excluding her parents or legal guardian from the decision; and whether the parents or legal guardian have previous knowledge of the minor's sexual activity or involvement in decisions regarding the minor's sexual activity.

In addition, the act currently permits the court to appoint an attorney or guardian ad litem to represent the minor in any proceeding regarding a matter under the act, upon the request of the minor. The bill would provide that if an attorney or guardian ad litem is appointed to represent a minor, the court would also appoint an attorney or guardian ad litem to represent the interest of a parent or legal guardian in loco parentis.

Finally, the bill would require the court to inform a minor of her right to appeal the decision of the court to deny a waiver of parental consent to the court of appeals.

MCL 722.903 and 722.904

BACKGROUND INFORMATION:

The Parental Rights Restoration Act. During the 1989-1990 legislative session, the legislature passed House Bill 5013, which would have established the Parental Rights Restoration Act. Governor Blanchard vetoed the bill in February of 1990.

Following the governor's veto, the bill became the subject of an initiative petition in accordance with the provisions of Article II, Section 9 of the state constitution. The initiative petition, which was nearly identical to the vetoed House Bill 5013 (as enrolled), was filed with the Secretary of State on July 6, 1990 and approved by the Board of State Canvassers on September 6, 1990. Both houses of the legislature approved the petition on September 12, 1990, with the House approving the measure by a vote of 61-40, and the Senate approving the measure by a vote of 28-9. The act was an example of an "indirect" initiative enacted strictly by the legislature and not requiring a vote of the electorate.

It should be noted that, unlike similar initiated laws such as the Michigan Gaming Control and Revenue Act, the Parental Rights Restoration Act only requires a simple majority vote in the legislature (along with gubernatorial approval) in order to be amended. The reason for this is a provision in the

state constitution, which states, in part, "no law adopted by the people at the polls under the initiative provisions of this section shall be amended or repealed, except by a vote of the electors unless otherwise provided in the initiative measure or by three-fourths of the members elected to and serving in each house of the legislature." [Article II, Section 9] This act, however, was never directly voted on by the electorate and, as such, does not need the three-fourths majority (83 in the House and 29 in the Senate).

The Supreme Court's Parental Consent Jurisprudence. Immediately following its landmark decision in *Roe v. Wade*, the U.S. Supreme Court set down several rulings regarding a variety of facets related to abortion, including parental notification, parental consent, and spousal consent. The first major case pertaining to parental consent was *Planned Parenthood of Central Missouri v. Danforth* (1976). In *Danforth*, the court invalidated a Missouri law that required the consent to an abortion by the husband of a married woman or by one parent of an unmarried pregnant minor, unless the abortion was medically necessary to preserve the life of the mother. It was argued that the law, as it applied to minors, should be more stringent than the similar spousal consent provision as state law is replete with provisions reflecting the interest of the state in assuring the welfare of minors. Further, it was argued that parental discretion has long been protected from unwarranted or unreasonable interference from the state. In striking down the parental consent provision, the court noted that the state may not impose a blanket parental consent requirement as a condition for an unmarried minor's abortion. The court stated, "the fault with the [parental consent provision] is that it imposes a special-consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy and does so without sufficient justification for the restriction" and that "the state does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." Further, the court noted, "[w]e emphasize that our holding that [the Missouri statute] is invalid does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy."

In *Bellotti v. Baird* (1979), the supreme court invalidated a Massachusetts statute that required parental consent before an abortion could be performed on an unmarried woman under 18 years of age, but permitted the abortion to proceed by order of a court "for good cause" if one or both parents refused consent. The court held that "if the state decides to require a pregnant woman to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained." In what should be familiar language, the court noted that "[a] pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the 'absolute, and possibly arbitrary, veto' that was found impermissible in *Danforth*."

In ascertaining whether the Massachusetts statute permitted any minor – mature or immature – to obtain judicial consent to an abortion without any parental consultation, the court noted that "under state regulation such as that undertaken by Massachusetts, every minor must have the opportunity – if she so desires – to go directly to a court without first consulting or notifying her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent. If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interests. If the court is persuaded that it is, the court must authorize the abortion. If, however, the court is not persuaded by the minor that she is mature or that the abortion would be in her best interests, it may decline to sanction the operation."

The court further noted that, "[t]here is, however, an important state interest in encouraging a family rather than a judicial resolution of a minor's abortion decision. Also…parents naturally take an interest in the welfare of their children – an interest particularly strong where a normal family relationship exists and where the child is living with one or both parents. These factors properly may be taken into account by a court called upon to determine whether an abortion

in fact is in a minor's best interests. If, all things considered, the court determines that an abortion is in the minor's best interests, she is entitled to court authorization without any parental involvement. On the other hand, the court may deny the abortion request of an immature minor in the absence of parental consultation if it concludes that her best interest would be served thereby, or the court may in such a case defer decision until there is parental consultation in which the court may participate. But this is the full extent to which parental involvement may be required. *For the reasons stated above, the constitutional right to seek an abortion may not be unduly burdened by state-imposed conditions upon initial access to court* [emphasis added]."

In 1981, the court in *H.L. v. Matheson* upheld a Utah statute that required a physician to notify, if possible, the parents or legal guardian of a minor who is about to have an abortion. The statute was challenged by a 15-year-old, on the grounds that it was overbroad in that it could be construed to apply to all unmarried minor girls, including those who are mature or emancipated. The court noted that it did not need to specifically address that point since the minor did not allege or proffer any evidence to suggest that she was mature or emancipated. However, the court did look at the facial constitutionality of the statute.

The plaintiffs contended that the statute amounted to a violation of a minor's right to privacy with respect to an abortion, and that the court had previously stricken statutes that required prior written consent as a prerequisite (see *Danforth*). The court, however, noted that there is no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion and, to that end, a statute requiring parental notice does not violate the constitutional rights of an immature dependent minor. The court further noted that the statute serves a significant state interest by providing an opportunity for parents to supply essential medical and other information to a physician. Further, "parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data." The court concluded, stating "[t]he Utah statute is reasonably calculated to protect minors…by enhancing the potential for parental consultation concerning a decision that has potentially traumatic and permanent consequences", and that "the statute plainly serves important state interests, is narrowly drawn to protect those interests, and does not violate any guarantees of the Constitution."

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, there is no measurable fiscal impact on either the Family Independence Agency or the Judiciary. (HFA analysis, 6-6-03)

ARGUMENTS:

For:

Under current law, a waiver from the requirement that a parent must consent to a minor's abortion may be granted if it is determined that granting the waiver is in the best interest of the minor or that she is sufficiently mature and well enough informed to make the decision independently of her parents. Critics say that the problem with the current language is that there are no clear standards as to what constitutes the minor's best interest or how to determine whether the minor is "sufficiently mature and well-enough informed". They believe it is the lack of standards that allows judges to "rubber stamp" waivers without full consideration of all the relevant factors in a case. To that end, the bill provides judges with a detailed set of standards to better determine whether to grant a waiver including, the minor's age, ability to comprehend information, and ability to express herself; the minor's relationship with her parents or guardian, including financial arrangements; the petitioner's school record and educational or career goals; the extent to which the minor has consulted with medical and mental health professionals about alternatives to abortion; and the minor's sexual history. Moreover, the bill would put into statute a rebuttable presumption that a minor is not capable of providing informed consent for medical treatment, and then a waiver could only be granted if the minor demonstrated to the court a level of maturity expected of an adult. The standards would be used to evaluate the minor's level of maturity.

The added standards would not in and of themselves determine the outcome of a waiver petition but are factors to be employed by the judge. There is nothing in the bill that requires the judge to automatically grant or deny a waiver request based on certain facts or circumstances. Rather, these added criteria are intended to ensure that the judge is sufficiently well-informed about the facts surrounding a case before issuing a ruling.

For:

There is anecdotal evidence to suggest that some minors who are denied a waiver by one judge in the

family division will simply file a request for a waiver with another judge or another circuit court, rather than filing an appeal with the Court of Appeals. To the extent that this happens, it greatly undermines the intent of the law and virtually ensures that a minor will obtain the parental consent waiver she is seeking. Under the bill, if a minor believes that she was denied a waiver without good cause, she can file an appeal or re-petition the court (but could not begin again in a new family division).

For:

The bill also strengthens the role of the parents when a minor seeks a parental consent waiver. Under the current process, the minor and her representatives meet with the judge without any involvement by or representation of the minor's parents. It seems unlikely that a judge can make a determination that the minor is sufficiently mature and well-enough informed to make a decision independently of her parents, if the parents are not represented in the proceeding. Parents, generally, at least know their children well-enough to be able to provide evidence to the judge regarding their children's behavior and, as the U.S. Supreme Court recognized in *Matheson*, they can provide judges with additional information to better determine whether the abortion is in the minor's best interest. Towards this end, the bill provides that when an attorney or guardian ad litem is appointed to represent a minor, the court must also appoint representation for the parents.

In addition, the bill follows well-established statutory and common law principles by providing parental involvement in the life of a daughter. Today, children cannot get an ear pierced, undergo surgery, or even go on a field trip for school without parental consent. Yet a minor can obtain an abortion without parental involvement. To strengthen parental involvement, the bill provides for a rebuttable presumption that a minor's best interest is served by involvement of her parents in any medical decision, and that a waiver can only be granted if the courts finds that both parents (or a legal guardian) have so materially defaulted in their duties to that minor that they have abdicated their right to parental involvement. The bill provides a set of standards for the court to use in evaluating a parent or a legal guardian.

Against:

The bill's provisions regarding the role of the minor's parents signify a marked change from the intent of the current law. The purpose of allowing a judicial bypass is to provide minors with another avenue to obtain consent to an abortion, absent the consent of her parents. Often a minor seeks a judicial bypass out of a legitimate fear of her parent's reaction to her pregnancy or fear of reprisal, as well as when she does not agree with her parent's decision (and the corresponding reasons for that decision) regarding her intended abortion. While it is unfortunate when a situation reaches the point where a minor faces no other alternative but to seek a waiver of the parental consent requirement, the government is not able to mandate healthy family communication where it does not exist. The judicial waiver process is typically reserved for those situations where a minor cannot openly discuss the situation in a non-threatening or non-hostile environment. Indeed, the U.S. Supreme Court recognized in *Bellotti* that "every minor must have the opportunity – if she so desires – to go directly to a court without first consulting or notifying her parents". The bill appears to run counter to this provision, and other facets of the court's parental consent jurisprudence. Opponents say it is already difficult to get a waiver of parental consent. They fear that the bill will make it virtually impossible for a minor to obtain a judicial bypass. This, they say, could lead to illegal and self-induced abortions.

The act currently follows the court's decision in *Bellotti*, whereby a minor is permitted to obtain judicial authorization for an abortion if (1) she is mature enough and well enough informed so as to make the decision regarding the abortion independently of her parents, or (2) the abortion would be in her best interests. Again, the bill runs counter to the *Bellotti* decision because it requires a higher maturity threshold. *Bellotti* requires only that the minor be sufficiently mature so as to make an independent decision regarding the abortion. The bill, however, would require the minor to be adjudged to have an adult level of maturity. Further, the bill lists a number of factors to be used to determine whether that level of maturity has been reached that could be used prejudicially to establish immaturity. For example, could the fact that the minor is dependent on her parents for housing, financial support, and transport (as many minors are) be used as evidence that the minor is not as mature as an adult?

In addition, the *Bellotti* opinion permits judicial consent to an abortion if it serves the minor's best interests. The bill, however, would create a rebuttable presumption that a minor's best interest is served by the involvement of her parents in any medical decision making, and would allow a waiver to be granted only if the court finds that the parent or legal guardian "has so materially defaulted in their

duties to the minor that they have abdicated their right to parental involvement". This is a marked departure from the court's rulings regarding parental consent, and could potentially invalidate the act if it were challenged in court. The bill reduces any serious consideration of the minor's best interests (separate from the parent's interests) and therefore, runs counter to *Bellotti*. The added parental consideration provisions used to determine whether the abortion is in the minor's best interests could also be construed so as to effectively amount to the "absolute, and possibly arbitrary, veto" that was found impermissible in *Danforth.*

Against:

The addition of factors for judges to use in determining whether to grant a waiver to a minor is unnecessary. Critics of the bill say that family division judges are particularly well qualified to hear these petitions. They are persons of integrity and take their jobs seriously. The judicial bypass system is working as intended. It should not be the legislature's role to substitute its judgment for that of the judiciary in these cases. It is the judge's role to consider all the relevant factors in each case. It is likely that the factors listed in the bill, along with others, are already part of the judicial decision making process, when they are relevant. Each case, however, is likely to be different.

Even though the bill does not say how a judge is supposed to weigh the factors listed in the bill, proponents of the bill appear to believe that there would be fewer parental consent waivers if the law contained this list of factors for the judge to consider. This concerns those who believe the current system is working, and it leads them to believe that the bill is an attempt to make obtaining waivers more difficult for minors, to create a more adversarial, hostile environment discouraging to pregnant teenagers seeking to exercise their reproductive rights.

POSITIONS:

The Right to Life of Michigan supports the bill. (6-16-03)

The Michigan Family Forum supports the bill. (6-13-03)

The Michigan Catholic Conference supports the bill. (6-16-03)

Planned Parenthood Affiliates of Michigan opposes the bill. (6-11-03)

The National Organization of Women - Michigan Conference opposes the bill. (6-11-03)

The Michigan Abortion and Reproductive Rights Action League (MARAL) opposes the bill. (6-11-03)

The National Council of Jewish Woman - Greater Detroit Section opposes the bill. (6-11-03)

The American Civil Liberties Union of Michigan opposes the bill. (6-11-03)

Analyst: M. Wolf

■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.